SUPREME COURT, U. S.

FILED
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JOHN F. DAVIS, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 471

GEORGE W. LYNCH,
Petitioner,

vs.

STATE OF INDIANA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

BRIEF FOR RESPONDENT IN OPPOSITION

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Respondent, the State of Indiana, prays that the Petition for a Writ of Certiorari to review the judgment of the Indiana Supreme Court in the above case be denied.

CONSTITUTIONAL PROVISIONS AND COURT RULES INVOLVED

Amendment 14 to the Constitution of the United States, provides:

> ". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens

of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Indiana Supreme Court Rule 1-14B provides:

"Whenever a new trial is requested on the ground or grounds 'that the verdict or decision is not sustained by sufficient evidence or is contrary to law,' the moving party shall file a memorandum stating specifically under such itemized cause wherein such evidence is insufficient or the verdict or decision is contrary to law. *The party filing such motion shall be deemed to have waived any ground not specified in the memorandum.*" (Emphasis added)

United States Supreme Court Rule 23.1(f):

"The petition for writ of certiorari shall contain in the order here indicated

* * *

"If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific positions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

Indiana Supreme Court Rule PC 2, § 2 provides:

> "Any defendant convicted after a trial may petition the Supreme Court for permission to file a Belated Appeal where:
>
> (a) He filed a Motion for New Trial which was overruled;
>
> (b) No appeal was perfected for the defendant;
>
> (c) The failure to perfect the appeal was not due to the fault of the defendant; and,
>
> (d) The defendant has been diligent in requesting permission to file a belated appeal." Advance sheets August 13, 1969, 248 N.E. 2d—No. 5, 249 N.E. 2d—No. 1, p. XLIV.

QUESTIONS PRESENTED FOR REVIEW

1. Whether petitioner may raise, in this court, for the first time, on a petition for a writ of certiorari to review the decision of the Supreme Court of Indiana, federal constitutional questions which were not raised and decided in the Indiana Supreme Court.

2. Whether the decision of the Indiana Supreme Court in this cause was based on independent and adequate state grounds.

3. Whether petitioner was denied equal protection of the law under the fourteenth amendment of the United States Constitution.

4. Whether petitioner was denied due process of law under the fourteenth amendment of the United States Constitution.

STATEMENT OF THE CASE

Petitioner was convicted for the possession of marihuana. Petitioner filed a motion for a new trial with the trial court challenging the sufficiency of the evidence to support his conviction. However, Petitioner did not file a Memorandum with his Motion for New Trial as required by Rule 1-14B, Rules of the Supreme Court of Indiana. The Indiana Supreme Court affirmed the judgment of the trial court convicting Petitioner for Petitioner's failure to file the required Memorandum. Petitioner now claims he was denied the equal protection of the laws and the due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States by the decision of the Indiana Supreme Court.

ARGUMENTS AGAINST GRANTING THE WRIT

I

Petitioner May Not Raise, in This Court, for the First Time, on a Petition for a Writ of Certiorari to Review the Decision of the Supreme Court of Indiana, Federal Constitutional Questions Which were Not Raised and Decided in the Indiana Supreme Court

Petitioner claims that the Indiana Supreme Court's dismissal of his appeal for his failure to comply with Rule 1-14B, Rules of the Indiana Supreme Court, was a denial of the equal protection of the law and the due process of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Rule 23.1(f), 28 U.S.C.A., Supreme Court Rules, provides that:

"The petition for writ of certiorari shall contain in the order here indicated

* * *

"(f) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court, with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

Even a casual examination of petitioner's Petition in this Court indicates petitioner has wholly failed to comply with Rule 23.1(f). Arguably, petitioner's failure to comply with this requirement of the rule is jurisdictional and hence his Petition must be denied out of hand by this court. See *Cardinalle v. Louisiana,* 89 S.Ct. 1162 (1969).

However, it is readily apparent that a more fundamental reason lies for denying this petition. Petitioner could not comply with Rule 23.1(f) because the federal questions sought to be reviewed here were never presented to or decided by the Indiana Supreme Court. An examination of the Indiana Supreme Court's decision in *Lynch v. State,* — Ind. —, 245 N.E. 2d 334 (1969), dismissing petitioner's appeal readily discloses that the federal questions peti-

tioner seeks to have reviewed here were never raised in, or decided by, the Indiana Supreme Court. "It was very early established that the court will not decide constitutional issues raised here for the first time on review of state court decisions." *Cardinalle v. Louisiana*, 89 S.Ct. 1162 (1969). Thus, this petition should be denied.

II

The Decision of the Indiana Supreme Court in This Cause Was Based on Independent and Adequate State Grounds

This Court has long declined to review state court judgments resting on independent and adequate state grounds, because to do so would be to render advisory opinions. See *Fay v. Noia*, 372 U.S. 391, 428 (1963) where the Court said:

> "It is a familiar principle that this court will decline to review state court judgments which rest on independent and adequate state grounds, notwithstanding the copresence of federal grounds."

The principle of not reviewing State court judgments, resting on independent state grounds, applies to both procedural and substantive State grounds. *Henry v. Mississippi*, 379 U.S. 433 (1965). Regarding State procedural grounds, in *Henry, supra*, the Court stated:

> "These cases settle the proposition that a litigant's procedural default in state proceedings do not prevent vindication of his federal rights unless the state's insistence on compliance with his procedural rules serves a legitimate state interest." at p. 477.

See also, *Cardinalle v. Louisiana, supra.*

Petitioner was convicted for the possession of marijuana in a state trial court having criminal jurisdiction. Petitioner filed a motion for a new trial challenging the sufficiency of the evidence to support his conviction. Petitioner did not, however, file a memorandum with his motion for new trial in the trial court specifying the particulars in which the evidence was insufficient.

Rule 1-14B, Rules of the Indiana Supreme Court, provides that:

> "Whenever a new trial is requested on the ground or grounds 'that the verdict or decision is not sustained by sufficient evidence or is contrary to law,' the moving party shall file a memorandum stating specifically under such itemized cause wherein such evidence is insufficient or the verdict or decision is contrary to law. The party filing such motion shall be deemed to have waived any ground not specified in the memorandum."

The Indiana Supreme Court affirmed the decision of the trial court for petitioner's failure to file a memorandum with his motion for a new trial as required by Rule 1-14B, Rules of the Indiana Supreme Court. Petitioner alleged three grounds for a new trial. The Supreme Court said:

> ". . . [T]herefore, the first and second specifications in the motion for new trial were not properly presented to the trial court and will not be considered on appeal here.
>
> "In the third ground for new trial above stated, the appellant claims error in the admitting of State's Exhibit No. 1. However, under the proce-

dural law of Indiana, the motion must contain a copy or the substance of the exhibit claimed to have been erroneously admitted and must state the grounds of the objections to the evidence. *Golden Guernsey Farms v. State* (1945), 223 Ind. 606, 612, 62 N.E. 2d 699.

"The assignment of errors filed in this cause assigns only the overrulings of appellant's motion for new trial. Therefore, all other matters which the appellant has attempted to raise in his brief which are not covered by the motion for new trial have been waived. *Haddock v. State* (1965), 246 Ind. 269, 671 [5 Ind. Dec. 599], 207 N.E. 2d 813." *Lynch v. State*, — Ind. —, 245 N.E. 2d 334, 335.

In a more recent case involving an identical question, the Indiana Supreme Court explained its reasons for affirming a lower court conviction for an appellants failure to comply with Rule 1-14B, Rules of the Indiana Supreme Court. The court said:

". . . [I]t [Rule 1-14B] requires that a party present an alleged reversible error to the trial court with some degree of specificity prior to presenting it to this court on appeal. The rule was intended to allow a trial court some opportunity to review and correct its own errors and, thereby, in some instances avoid the extra travail and expense of an appeal." *Graham v. State*, — Ind. —, 249 N.E. 2d 25 (1969).

An additional reason appears for the Indiana Rule. A reversal of a trial judge has an adverse effect upon his career as a judge. See Graham v. State, *supra*. To fully understand the reasons assigned by the court for the Indiana Rule it must be pointed out that a judge in Indiana is elected to the bench. Moreover, a trial judge's reputation depends in part upon reversals of his decisions by the

Indiana Supreme Court. The reputation of a judge whose judgments are reversed suffers thereby diminishing his opportunity to return to the bench by way of reelection.

Whatever the merits of the Indiana Rule, the bench and bar in Indiana must work within the existing framework. The existing framework involves judges who are elected to the bench and Indiana Supreme Court Rule 1-14B. The rules are clear and all parties are apprised of them. The Indiana Rule is an independent and adequate state ground clearly serving a legitimate state interest. Consequently this court should decline direct review of the matter by certiorari.

III

Petitioner Was Not Denied the Equal Protection of the Laws as Guaranteed by the Fourteenth Amendment of the Constitution of the United States

Petitioner alludes to the Fourteenth Amendment to the Constitution of the United States providing that no state shall deny any person ". . . the equal protection of the laws." Petitioner apparently claims, somewhat obscurely, that Rule 1-14B, Rules of the Indiana Supreme Court, applies to indigents, a class to which Petitioner claims to belong, but not to one financially able to employ his own attorney. There is absolutely no basis in fact or law to support Petitioner's claim. Rule 1-14B applies to rich and poor alike.

The cases relied upon by Petitioner afford absolutely no support for his contentions. *Griffin v. Illinois*, 351 U.S. 12 (1957), involved an accused denied a free transcript neces-

sary for an appeal. Petitioner had a transcript. *Douglas v. California,* 372 U.S. 353 (1963), involved an accused denied free counsel on appeal. Petitioner has always had counsel. *Macon v. Orange Circuit Court,* 245 Ind. 269, 195 N.E. 2d 352, rehearing denied, 198 N.E. 2d 229 (1964), also involved an accused denied counsel on appeal. Again, Petitioner has always had counsel.

Petitioner has wholly failed to construct an argument which on the facts or the law raises an equal protection question. Thus, this Petition should be denied.

IV

Petitioner Was Not Denied the Due Process of Law as Guaranteed by the Fourteenth Amendment to the Constitution of the United States

Petitioner claims, somewhat obscurely, that in some undesignated way he was denied the due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States. Respondent can only speculate that Petitioner is contending either that Rule 1-14B, Rules of the Indiana Supreme Court, requiring a Memorandum, is a denial of the due process of law, or that Rule 1-14B should not apply to Petitioner because he is a pauper. Petitioner's absurd argument merits little comment.

Rule 1-14B as interpreted by the Indiana Supreme Court provides only that an improperly preserved issue presents no question for review by the Indiana Supreme Court. The Rule provides that a Motion for a New Trial challenging the sufficiency of the evidence to support a conviction must be accompanied by a Memorandum stating with partic-

ularity why the evidence was insufficient to support the conviction. The Rule also provides that ". . . [T]he party filing such motion shall be deemed to have waived any ground not specified in the memorandum." The Indiana Supreme Court has construed the rule to mean that no issue is presented to the court on appeal and that the judgment of the lower court will be affirmed if a Motion for a New Trial is not accompanied by a Memorandum as required by Rule 1-14B. *Graham v. State,* — Ind. —, 249 N.E. 2d 25 (1969); *Lynch v. State,* — Ind. —, 245 N.E. 2d 334.

Petitioner filed a Motion for a New Trial with the trial court challenging the sufficiency of the evidence to support his conviction for the possession of marihuana. Petitioner's Motion for a New Trial was not accompanied by a Memorandum. On appeal the Indiana Supreme Court affirmed the judgment of the trial court convicting Petitioner for the reason that the errors sought to be reviewed by Petitioner were not properly preserved and hence had been waived. *Lynch v. State, supra.*

Waiver on appeal is neither new nor unique to the law of the State of Indiana. Federal Appellate Court decisions providing that improperly preserved issues are waived on appeal are legion, both in this Court and in the Federal Circuit Courts of Appeal. See *Cardinalle v. Louisiana,* 89 S.Ct. 1162 (1969).

Thus, that Indiana may provide that improperly preserved issues are waived on appeal is hardly a denial of the due process of law. Consequently the Petition should be denied.

Parenthetically, Petitioner has a viable state remedy. Rule PC 2, § 2, Rules of the Indiana Supreme Court, effective August 1, 1969, provides that a defendant failing to perfect a direct appeal through no fault of his own, as did Petitioner, may initiate proceedings to prosecute a belated appeal. Advance sheets, August 13, 1969, 248 N.E. 2d—No. 5, 249 N.E. 2d—No. 1, p. LIV. Consequently, Petitioner may still obtain a review of his conviction on the merits by means of a belated appeal.

CONCLUSION

Respondent submits that this Petition for Writ of Certiorari to the Supreme Court of Indiana should be denied.

Respectfully submitted,

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